IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 5667 of 1986

For Approval and Signature:

HONOURABLE MR.JUSTICE K.A.PUJ

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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GEB POWER ENGG.ASSO THROUGH D.S.VASAVADA & 1 - Petitioner(s)

Versus

THE SECRETARY AND/OR HIS SUCCESSOR IN THE OFFICE OF THE & 3 - Respondent(s)

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Appearance :

MR DS VASAVADA for Petitioner(s) : 1 - 2.
MR VJ DESAI for Respondent(s) : 1,
RULE NOT RECD BACK for Respondent(s) : 2,
RULE SERVED for Respondent(s) : 3 - 4.

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CORAM : HONOURABLE MR.JUSTICE K.A.PUJ

Date : 27/01/2006

ORAL JUDGMENT

1. The petitioners have filed this petition under Article 226 of the Constitution of India, praying for direction to respondent Board to treat the petitioner as promoted to the post of

Deputy Engineer with retrospective dates considering the provisions of GSO 276 and also prayed for the direction to pay the difference in salary with all consequential benefits with interest and seniority with retrospective dates.

2. The petition was admitted and rule was issued on 4.4.1988. However, interim relief was not granted. It is the case of the petitioner that the petitioner No.2 has joined service of the respondent Board as Trainee Engineer on 18.9.1980. The respondent Board had terminated the services of the petitioner No.2 from 19.8.1981 without observing any formality or without giving any opportunity. The petitioner was again taken on service from 21.8.1981 as Junior Engineer. As per the revised policy, the Junior Engineer belonging to SC/ST having passed the degree examination and 3 years

experience as Junior Engineer, are to be promoted as per seniority only. As per the say of the petitioner, the petitioner is, therefore, entitled and eligible to be promoted as Deputy Engineer from 21.8.1984.

3. Mr.D.S.Vasavda, learned advocate appearing for the petitioners has submitted that the petitioner No.2 was not having any positive demerits and hence he was eligible for being promoted to the post of Deputy Engineer as per the seniority. He has further submitted that the respondents No.2 to 4 were quite juniors to the petitioner and, therefore, the action of the respondent Board in giving the promotion to the respondents No.2 to 4 and denying promotion to the petitioner No.2 was quite illegal, improper, discriminatory, violative of Articles 14 and 16 of the Constitution of India and against the well settled legal position.

4. Mr.Vasavda has further submitted that the petitioner No.2 was performing his duty quite deligiently. Despite this fact, the respondent Board has communicated the adverse remarks for the year 1984 on 7.6.1985. The petitioner has preferred an appeal against the said adverse remarks on 23.7.1985. The said appeal was not decided by the respondent Board till the filing of the present petition. He has further submitted that as per the rules framed by the respondent Board for writing and communication of adverse remarks, all the employees should be communicated his adverse remarks within the time limit prescribed as per the establishment circulars. He has further submitted that the respondent Board has issued the circular on 8.1.1980 regarding writing of confidential reports. As per the revised time limit for communication of adverse remarks it was 45

days. The adverse remarks for the year 1984 were not communicated to the petitioner No.2 within the prescribed time limit. He has further submitted that the appeal preferred by the petitioner No.2 was also not decided by the respondent Board. Mr.Vasavda has further submitted that the action or omission on the part of the respondent Board to promote the petitioner to the post of Deputy Engineer with retrospective effect from due date with all consequential benefits was ultra vires, arbitrary, capricious and violative of the policy framed by the respondent Board. As the adverse remarks were not communicated in time, the petitioner was deprived of an effective opportunity of representation against the same. Moreover, the adverse remarks were vague. The specific instances were not pointed out. The deficiencies were not pointed out as required under the Establishment Circular referred to in

the petition.

5. In support of his submission he relied on the decision of this Court **in the case of Special Civil Application No.6058 of 1986 decided on 26.7.2004**, wherein this Court has taken a view that the petitioner No.2 was not considered for promotion on the day on which respondent Nos.3 to 5 were promoted. The Court has, therefore, directed the respondent Board to reconsider the case of the petitioner No.2 and would consider his case for Deputy Engineer as on 12.9.1986 on the basis of the criteria laid down by the respondent Board. The Court has further directed the respondent Board to serve copy of the order to respondents No.2, 3 and 4 who have chosen not to appear. With the clarification that if they were adversely affected by the said order, the respondent No.1 would serve them copy of the said judgment within three

days from the date of receipt of this order and it would be open for respondent Nos.2, 3 and 4 to approach this Court by way of appropriate application within 30 days from the date of receipt of the copy of the order from the respondent No.1.

6. An affidavit is filed on behalf of the respondent No.1. Respondents No.2 and 3 are served yet nobody appeared on their behalf. Notice issued to respondent No.4 did not come back. In affidavit in reply filed on behalf of the respondent No.1 it is stated that apart from seniority, the candidate's three years record was considered while giving promotion to the post of Deputy Engineer. It is further stated that the competent selection committee had considered the petitioner's case in November, 1984 and the petitioner was not given promotion as his service record for the year

1984 was not good but only fair. The remarks for the year 1984 were that his resourcefulness was very limited and work out put was generally below average out put. Punctuality was very poor. Interest of work was limited. He was having limited capacity for training and development of others. He was trying to evade responsibility and very frequent reminders to work done. It is further stated that for getting promotion for every employee including Scheduled Caste and Scheduled Tribe three years record should be good and the petitioner had no such record hence promotion was not given. It is further submitted that the petitioner's appeal against remarks of 1984 was rejected on 3.7.1987 and remarks were confirmed. It is further stated that the petitioner was communicated remarks and he had filed an appeal and his appeal has been rejected and so no prejudice has been caused. It is further

submitted that even his 1985 record is not good but there were adverse remarks. The remarks were made according to law and after considering his service record. On the basis of all these reasons, promotion was not given to the petitioner No.2 to the post of Deputy Engineer.

7. The petitioner No.2 has filed affidavit-in-rejoinder and denied the facts stated and averments made in the affidavit in reply.

8. After having heard the learned advocate appearing for the petitioner and after having gone through the petition, documents attached thereto, affidavit in reply as well as affidavit in rejoinder and after having considered the decision of this Court, the Court is of the view that there is no denial of the fact that there are adverse remarks in the

report for the year 1982. The same were not communicated within the time prescribed by the respondent Board. The adverse remarks for the year 1984 were communicated by the respondent Board on 7.6.1985. Though an appeal was preferred by the petitioner No.2, the said appeal was not decided till the date of filing of the present petition. It is only in the affidavit in reply it was stated for the first time that the said appeal was rejected on 3.9.1987. Even with regard to adverse remarks of 1985, the same were not communicated to the petitioner No.2. If the adverse remarks are made and they are not communicated in time, the same would adversely affect and the candidate would loose his right of making further representation by way appeal to the authority against such remarks. Without communication of adverse remarks, promotion cannot be denied to the concerned candidate.

The Court, therefore, finds substance in the grievance raised by the petitioner in this petition and even the respondent Board in its affidavit has not justified the denial of promotion of the Deputy Engineer to the petitioner. No further facts were pointed out. It is also not clear from the record available with the Court, as to on which date the petitioner No.2 was given promotion to the post of Deputy Engineer.

9.In the above view of the matter, the Court hereby directs the respondent Board to consider the case of the petitioner No.2 for promotion to the post of Deputy Engineer, as on the date on which the petitioner was entitled to be promoted. The respondent is further directed to supply copy of the decision of the appeal filed by the petitioner No.2 against the adverse remarks and also supply copy of the

adverse remarks which were said to have been made in the year 1985. The appeal decision as well as adverse remarks will be considered in light of the decided case law, while considering the case of the petitioner No.2 for the promotion of post of Deputy Engineer with retrospective effect as claimed in the petition. If necessary, the petitioner No.2 will be heard in the matter and decision will be rendered forthwith. After considering the representation, adverse remarks as well as the decisions, the respondent Board will pass appropriate order and if eligible, will grant promotion to the petitioner No.2 with due date, while considering the case of the petitioner No.2. Copy of the order should also be forwarded to respondents No.2, 3 and 4 within three days from the date of decision and it is open for them to make appropriate representation from the date of receipt of the

order from the respondent Board.

10. Subject to the aforesaid directions and observations this petition is accordingly disposed off. Rule is made absolute to the above extent without any order as to costs.

(K. A. PUJ, J.)

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